

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

DARRIN BIVINS,	:	
	:	Civil Action No. 04-4673 (GEB)
Petitioner,	:	
	:	
v.	:	OPINION
	:	
LYDELL B. SHERRER, et al.,	:	
	:	
Respondents.	:	

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JUN 22 2006

APPEARANCES:

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BROWN, JR., Chief Judge

Petitioner Darrin Bivins, a prisoner currently confined at Northern State Prison in Newark, New Jersey, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents are Lydell B. Sherrer and the Attorney General of New Jersey.

For the reasons stated herein, the Petition must be denied.

I. BACKGROUND

A. Factual Background

The relevant facts are set forth in the opinion of the Superior Court of New Jersey, Law Division, Essex County, on Petitioner's first state-court motion for post-conviction relief.¹

This case arises from the January 18, 1991 robbery of Sidney Walters by two men near the corner of South Orange Avenue & South 9th Street in Newark. The incident was witnessed by Edna Smith, an acquaintance of the victim. She provided the police with a general description of the assailants and advised the investigating officers that the shooter was known on the streets as "Farad" and "Malik." However, she was unable to identify either assailant after viewing books of photographs provided by the police.

Nonetheless, within a few weeks of the shooting, Ms. Smith saw the defendant on the street and followed him to his girlfriend's apartment. Ms. Smith then called the police who subsequently retrieved Mr. Bivens from those premises. It is unclear if defendant was then identified by Ms. Smith and subsequently arrested, or if he had been arrested on outstanding warrants before he was identified by that witness.

The arresting officer, Michael Thomas, testified at the time of trial. He specifically stated that the defendant's girlfriend, Blanche Stevenson, allowed him to enter the subject apartment. Additionally, he testified that the defendant was in his plain view when Ms. Stevenson opened the apartment door. This officer testified that there were open charges against the

¹ Pursuant to 28 U.S.C. § 2254(e)(1), "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

defendant at the time of arrest. In spite of the officer's testimony, Ms. Stevenson testified that the arresting officers did not have her consent to enter the apartment, but rather, pushed in her door, seized the defendant and then "tore up" her home.

Regardless of the issues surrounding the defendant's arrest, it is clear that both the victim, Sidney Walters, and Ms. Smith made in-court identifications of defendant as one of the perpetrators of this crime.

(Respondents' Exhibit 10 at 1-2 (citations to trial record omitted) (emphasis in original).)

B. Procedural History

Pursuant to a jury trial, Petitioner was found guilty of first-degree robbery, N.J.S.A. 2C:15-1, (Count One); second-degree aggravated assault, N.J.S.A. 2C:12-1b(1), (Count Two); third-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5b, (Count Three), and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4a, (Count Four). On Count One, Petitioner was sentenced to a mandatory extended term of life with 25 years of parole ineligibility. The sentences on all other counts were made to run concurrently. The judgment of conviction was entered December 16, 1991. (RE2.)

On direct appeal, the Superior Court of New Jersey, Appellate Division, affirmed. (RE5.)

On April 26, 1993, Petitioner filed his first motion for post-conviction relief. By letter opinion and order entered June 30, 1995, the PCR court denied relief. (RE9; RE10.) The

Appellate Division affirmed the denial of relief and, on March 16, 1998, the Supreme Court of New Jersey denied certification. (RE14; RE17.)

On April 27, 1998, Petitioner filed in the trial court a second motion for post-conviction relief. On October 1, 1998, the trial court entered an order that the motion was withdrawn by Petitioner. Apparently, Petitioner attempted to re-file his withdrawn motion. The trial court never acted on the re-filed motion. By order of the Appellate Division, the re-filed motion was deemed filed nunc pro tunc as of November 13, 1998. (RE20.) On March 27, 2003, the PCR court denied relief. (RE22 at RA24.) The Appellate Division affirmed the denial of relief and, by order entered June 17, 2004, the Supreme Court of New Jersey denied certification. (RE23; RE26.) This Petition followed.

II. 28 U.S.C. § 2254

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 now provides, in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

With respect to any claim adjudicated on the merits in state court proceedings, the writ shall not issue unless the adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000) (O'Connor, J., for the Court, Part II). A state court decision "involve[s] an unreasonable application" of federal law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," and may involve an "unreasonable application" of federal law "if the state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context

where it should apply," (although the Supreme Court expressly declined to decide the latter). Id. at 407-09. To be an "unreasonable application" of clearly established federal law, the state court's application must be objectively unreasonable. Id. at 409. In determining whether the state court's application of Supreme Court precedent was objectively unreasonable, a habeas court may consider the decisions of inferior federal courts. Matteo v. Superintendent, 171 F.3d 877, 890 (3d Cir. 1999).

Even a summary adjudication by the state court on the merits of a claim is entitled to § 2254(d) deference. Chadwick v. Janecka, 302 F.3d 107, 116 (3d Cir. 2002) (citing Weeks v. Angelone, 528 U.S. 225, 237 (2000)). With respect to claims presented to, but unadjudicated by, the state courts, however, a federal court may exercise pre-AEDPA independent judgment. See Hameen v. State of Delaware, 212 F.3d 226, 248 (3d Cir. 2000), cert. denied, 532 U.S. 924 (2001); Purnell v. Hendricks, 2000 WL 1523144, *6 n.4 (D.N.J. 2000). See also Schoenberger v. Russell, 290 F.3d 831, 842 (6th Cir. 2002) (Moore, J., concurring) (and cases discussed therein).

The deference required by § 2254(d) applies without regard to whether the state court cites to Supreme Court or other federal caselaw, "as long as the reasoning of the state court does not contradict relevant Supreme Court precedent." Priester v. Vaughn, 382 F.3d 394, 398 (3d Cir. 2004) (citing Early v.

Packer, 537 U.S. 3 (2002); Woodford v. Visciotti, 537 U.S. 19 (2002)).

Although a petition for writ of habeas corpus may not be granted if the Petitioner has failed to exhaust his remedies in state court, a petition may be denied on the merits notwithstanding the petitioner's failure to exhaust his state court remedies. See 28 U.S.C. § 2254(b)(2); Lambert v. Blackwell, 387 F.3d 210, 260 n.42 (3d Cir. 2004); Lewis v. Pinchak, 348 F.3d 355, 357 (3d Cir. 2003).

Finally, a pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 (1972). A pro se habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. See Royce v. Hahn, 151 F.3d 116, 118 (3d Cir. 1998); Lewis v. Attorney General, 878 F.2d 714, 721-22 (3d Cir. 1989); United States v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969), cert. denied, 399 U.S. 912 (1970).]

III. ANALYSIS

A. "Brady" Violation

Petitioner contends that the prosecutor violated his constitutional obligation to produce crime scene photographs, prior statements of Edna Smith and Sidney Walters, and the full name and address of another alleged eyewitness listed in a police

report only as "Schwartz." This is a claim that the prosecutor violated his constitutional obligation to produce exculpatory evidence to the defense.

The prosecution in a criminal matter has a constitutional obligation to disclose exculpatory evidence to the defendant. See Brady v. Maryland, 373 U.S. 83 (1967); Giglio v. United States, 405 U.S. 150, 154 (1972) ("A finding of materiality of the evidence is required under Brady"). Exculpatory evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). Nondisclosure merits relief only if the prosecution's failure "undermines confidence in the outcome of the trial." Kyles v. Whitly, 514 U.S. 419, 434 (1995) (quoting Bagley, 473 U.S. at 678).

The PCR court found this claim both procedurally barred and meritless.

[Rule] 3:22 contains certain procedural bars to a petition for post-conviction relief. Essentially, these rules are in place to promote our courts' strong interest in achieving finality. State v. Mitchell, 126 N.J. at 584, supra. R. 3:22-3 expresses the principle that post-conviction relief is neither a substitute for appeal nor for a motion incident to the proceedings in the trial court. ... R. 3:22-4 provides that any ground for relief not raised in a prior proceeding will be barred unless:

- (a) The ground for relief not previously asserted could not reasonably have been raised in any prior proceeding;
- (b) The enforcement of the bar would result in fundamental injustice; or
- (c) The denial of the relief would be contrary to the Constitution of the United States or the State of New Jersey.

...

R. 3:22-12 provides: "A petition to correct an illegal sentence may be made at any time. No other petition shall be filed pursuant to this rule more than 5 years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect."

In this case, it is clear that petitioner's most recent petition for post-conviction relief was filed well beyond five years following the December 20, 1991 judgment of conviction. However, courts sometimes relax this 5-year limitation. In State v. Afandor, 151 N.J. 41, 52 (1997), the court explained that this relaxation ought to occur only where "exceptional circumstances" exist. To make this determination, judges should "consider the extent and cause of the delay, the prejudice to the State, and the importance of the petitioner's claim in determining whether there has been an 'injustice' sufficient to relax the time limits." (Citing State v. Mitchell, 126 N.J. 565, 580 (1992)). Moreover, "absent compelling, extenuating circumstances, the burden to justify filing a petition after the five-year period will increase with the extent of the delay, for as time passes, justice becomes more elusive and the necessity for preserving finality and certainty of judgments increases." Id.

...

Regarding the claim of prosecutorial misconduct, no evidence or any factual explanation is offered as to why this claim is being made. Furthermore, this issue was not raised at trial nor was it raised on appeal or

in the first petition for post-conviction relief and therefore, it is barred from consideration by the court. Moreover, petitioner's several allegations of misconduct are lacking in factual support and conclusory. Based on a review of the record, the claim of prosecutorial misconduct is wholly frivolous.

As such, given the fact that these arguments have already been raised and rejected, or in the alternative, are wholly frivolous, it is clear that petitioner has not shown "excusable neglect" in not filing this petition within five years of final judgment. R. 3:22-12. Therefore, pursuant to R. 3:22-12, the claims are both time barred and devoid of merit.

(RE22 at RA28-31 (emphasis in original).) The Appellate Division affirmed the denial of relief for the reasons stated by the PCR court. (RE23.)

A procedural default occurs when a prisoner's federal claim is barred from consideration in the state courts by an "independent and adequate" state procedural rule. See, e.g., Doctor v. Walters, 96 F.3d 675, 683 (3d Cir. 1996)]. Federal courts may not consider the merits of a procedurally defaulted claim unless the applicant establishes "cause" to excuse the default and actual "prejudice" as a result of the alleged violation of the federal law or unless the applicant demonstrates that failure to consider the claim will result in a fundamental "miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Carpenter v. Vaughn, 296 F.3d 138, 146 (3d Cir. 2002).

On habeas review of state prisoner claims, a federal court "will presume that there is no independent and adequate state ground for a state court decision when the decision 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of

any possible state law ground is not clear from the face of the opinion.'" Coleman, 501 U.S. at 734-35 (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)).² Only a "firmly established and regularly followed state practice" is adequate to prevent subsequent habeas review in federal court. James v. Kentucky, 466 U.S. 341, 348-351 (1984). See also Lee v. Kemna, 534 U.S. 362, 376 (2002) ("Ordinarily, violation of 'firmly established and regularly followed' state rules ... will be adequate to foreclose review of a federal claim." (citations omitted)). Generally speaking, "[a] state court's refusal to address a prisoner's federal claims because he has not met a state procedural requirement is both independent and adequate." Cabrera v. Barbo, 175 F.3d 307, 312 (3d Cir. 1999) (citations omitted).

The "cause" standard requires a petitioner to show that some objective factor external to the defense impeded his efforts to comply with the state procedural rule. See Coleman, 501 U.S. at 752 (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)). In the absence of a Sixth Amendment violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation. Coleman, 501 U.S. at 754. Neither a pro

² A state court's reliance on a procedural bar as an alternate holding is sufficient to trigger the "cause" and "prejudice" test. See United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 440 (3d Cir. 1982).

se prisoner's ignorance of the procedural rule nor inadvertence satisfies the cause standard. Murray at 485-87. Failure of the state court to "bend the rules" for a pro se litigant is not cause. Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992).

To establish "prejudice," a petitioner must prove "'not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension.'" Murray v. Carrier, 477 U.S. 478, 494 (1986) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). In the context of an ineffective assistance claim, the Court of Appeals for the Third Circuit has held that prejudice occurs where "there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996).

In the alternative, in order to establish that failure to review an otherwise procedurally defaulted claim will result in a "miscarriage of justice," a petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Carrier, 477 U.S. at 496. "Thus, to establish a miscarriage of justice, the petitioner must prove that it is more likely than not that no reasonable juror

would have convicted him." Werts, 228 F.3d at 193 (citing Schlup v. Delo, 513 U.S. 298, 326 (1995)).

Here, the State courts determined that Petitioner's Brady claims were time-barred under New Jersey Court Rule 3:22-12. Petitioner does not contend that the time-bar is anything but a "firmly established and regularly followed state practice," and State case law suggests that the rule is firmly established and regularly followed. See, e.g., State v. Dugan, 289 N.J. Super. 15 (App. Div.), certif. denied, 145 N.J. 373 (1996); State v. Dillard, 208 N.J. Super. 722 (App. Div.), certif. denied, 105 N.J. 527 (1986). Thus, the State courts denied relief on an independent and adequate state ground, precluding review here of Petitioner's Brady claims unless he can meet the "cause" and "prejudice" standard or demonstrate that failure to consider the claim will result in a miscarriage of justice.

Petitioner has failed to allege any facts suggesting that he can meet the "cause" standard. With respect to the issue of "prejudice," Petitioner alleged in state court that he could have used the photographs to demonstrate that an iron fence obscured Ms. Smith's view of the offense conduct. Had that fact been material, it could have been brought to the attention of the jury by other means. Petitioner presents no other evidence of prejudice. Nor has he presented any evidence suggesting that failure to consider the claim will result in a miscarriage of

justice. Accordingly, the claims of Brady violations are procedurally barred; this Court will not consider them. Petitioner is not entitled to relief on these claims.

B. Ineffective Assistance of Counsel

Petitioner contends he was deprived of the effective assistance of counsel, in violation of the Sixth Amendment, on the following grounds: (1) counsel's failure to move to suppress all evidence seized pursuant to an unlawful arrest, which produced two sidewalk identifications, (2) counsel's failure to pursue the alleged Brady violations, (3) counsel's failure to object to the trial court's instruction on "reasonable doubt," and (4) counsel's failure to challenge the validity of prior convictions used to enhance Petitioner's sentence.

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right to counsel is "the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show both that his counsel's performance fell below an objective standard of reasonable professional assistance and that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been

different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Strickland at 694. Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

The performance and prejudice prongs of Strickland may be addressed in either order, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Id. at 697.

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. As a general matter, strategic choices made by counsel after a thorough investigation of the facts and law are "virtually unchallengeable," though strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91. If counsel has been deficient in any way, however, the habeas court must determine whether the cumulative effect of counsel's errors prejudiced the defendant within the meaning of

Strickland. See Berryman v. Morton, 100 F.3d 1089, 1101-02 (3d Cir. 1996).

1. Identification evidence

The PCR court rejected Petitioner's claim that trial counsel was ineffective for failing to move to suppress the evidence seized pursuant to his arrest, including the sidewalk identifications that followed.

Essentially, this petition hinges upon a claim of ineffective assistance of counsel. No doubt, there is a sixth amendment right to effective assistance of counsel at trial and on first appeal. The issue here is whether this defendant was indeed denied effective counsel in this case. In making this assessment, we must apply the two-part test which was developed by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) and adopted by our State's highest court in State v. Fritz, 105 N.J. 42 (1987). Under this test, defendant must:

- (1) Demonstrate that his attorney's performance was deficient because it fell below an objective standard of reasonableness; and
- (2) Show that counsel's performance was so deficient as to create a reasonable probability that these deficiencies materially contributed to his conviction.

Id. at 58.

Counsel for petitioner acknowledges this test. However, he argues that trial counsel's failure to move for suppression of the identification evidence was so egregious that prejudice (i.e., the second element of the Strickland - Fritz test) should be presumed. This court does not agree. The per se analysis advanced by petitioner is reserved for those instances where an attorney's performance is such a complete denial of

representation that prejudice may be presumed. State v. Savage, 120 N.J. 594, 614-615 (1990). [fn3]

[fn3. This case lists examples of such per se violations as including attorney's failure to appear at a critical stage of the proceedings or actual conflict of interest.]

When evaluating whether counsel's performance was objectively unreasonable, there is a strong presumption that counsel's conduct fell within a wide range of reasonable assistance. State v. Fritz, 105 N.J. at 52 (1987). In this regard, the burden falls upon petitioner to provide this court with the tools which might enable it to evaluate the actions or inactions of trial counsel. See, State v. Calloway, 275 N.J. Super. 13, 15 (App. Div. 1994) ("The defendant is obliged to provide the law division with the tools to enable it to fairly resolve the issues he has raised.") Accordingly, pursuant to this court's request for same, defendant has supplied this court with copies of the pretrial and trial transcripts. These appear to indicate that trial counsel did not move to suppress any evidence or identification of Mr. Bivens on the specific grounds that they may have been the fruit of an illegal arrest. Rather, it appears that trial counsel focused his efforts on challenging the identification procedures of the police.

In order to be "effective" it is not necessary that counsel make every conceivable motion that could have been made on his client's behalf. State v. Love, 233 N.J. Super. 38 (App. Div. 1989), certif. denied, 118 N.J. 188 (1989). Moreover, the failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel. State v. Worlock, 117 N.J. 596, 625 (1990). This point brings us to the second prong of the Strickland - Fritz test: whether the defense was prejudiced by trial counsel's failure to move for suppression of the identification evidence.

The exclusionary rule prohibits the introduction of evidence obtained in violation of a defendant's fourth amendment rights by an unreasonable seizure. Wong Sun v. United States, 371 U.S. 471 (1963). However, it is well settled that this rule has its exceptions. State v. Hunt, 91 N.J. 338, 349 (1982). For instance, failure to obtain a warrant may not

bespeak a fourth amendment violation when there is a consensual entry of a suspect's home. Illinois v. Rodriguez, 497 U.S. 177 91990). Defendant has failed to address this factor. This court's independent review of the trial transcripts indicates that there was conflicting testimony offered on this point. The police claimed that they were given consent to enter the premises, whereas Ms. Stevenson asserts that the arresting officers forcibly entered her apartment.

In any event, even if consent to enter the subject apartment is debatable, this court recognizes that the exclusionary rule is inapplicable where the evidence at issue has been obtained from an independent source. State v. Delane, 207 N.J. Super. 45, 51 (1986) (stressing that "the exclusionary rule must be subjected to a common sense application"). In this connection, defendant himself acknowledges that it was the witness who followed him and led the police to his girlfriend's apartment. The sidewalk identification followed, but was not the fruit, of the arrest. Moreover, the in-court identification would not have been rendered excludable, irrespective of the out-of-court identification, since the witness had an independent source for her in-court identification not derived from the arrest (i.e., a reliable mental image of the assailant). State v. Davis, 204 N.J. Super. 181, 184-185 (App. Div. 1985), certif. denied, 104 N.J. 78 (1986) (citing U.S. v. Crews, 445 N.J. 465 (1980)).

Given these facts, there is no indication that defendant's case was prejudiced by trial counsel's failure to move for suppression of the sidewalk identification on the grounds that it was the fruit of an illegal arrest. Indeed at oral argument, defense counsel referred to this decision as a strategic tactical issue and conceded that trial counsel had specific strategic reasons for approaching the issue this way. Accordingly, defendant has failed to present a cognizable claim which might support relief, or for that matter present a prima facie claim which might require that this court hold an evidentiary hearing to further explore the facts of this case. See State v. Preciose, 129 N.J. at 462-63 (1992). The defense has not requested that an evidentiary hearing be held, nor has it identified any unresolved factual issues which might reasonably support an argument under the Strickland test.

In this connection, the defense has also failed to offer a convincing argument regarding trial counsel's failure to make a motion to suppress evidence seized as a result of defendant's arrest. Moreover, the defense has failed to articulate what evidence was seized pursuant to defendant's arrest. Indeed, it does not appear that there was any evidence seized incident to the arrest.

Defendant has likewise failed to advance a significant argument under his claim that the police employed improper identification procedures when they allowed Ms. Smith to peruse through photographic books instead of providing her with a "proper" photographic array. Not only is this argument obscure, but it is also unsupported by any legal authority. Nonetheless, it is evident that Ms. Smith's identification of Mr. Bivens as one of Walters' assailants did not generate from any photographic array provided by the police. Indeed Ms. Smith could not identify the suspect from any of the photos provided by the police. Again, Ms. Smith's identification of defendant was clearly independent from police action and this court is convinced that any attempt to challenge the "photographic array" by trial counsel at trial would not have effected the verdict rendered.

... The dispute here is with trial counsel's strategy. Based upon this court's review of the record, trial counsel's performance was clearly not deficient, only at variance with defendant's thinking regarding trial tactics and strategy.

Defendant's contention that he did not receive the effective assistance of trial and appellate counsel is entirely without merit. The actions of both attorneys reflected sound trial and appellate strategy in the exercise of their professional judgment. The claimed errors do not overcome the presumption that counsels' conduct was within the wide range of acceptable, reasonable, professional assistance, nor do they demonstrate prejudice to defendant sufficient to undermine confidence in the outcome of the trial or defendant's appeal. Moreover, and of equal importance, thorough study of the record shows that defendant was provided a rigorous, viable defense and appeal; and that his counsels' performance were not unreasonable or inadequate.

The trial and appellate attorneys were conscientious and zealous in the representation of the petitioner. The record does not support or even give rise to a fair inference that counsel's performance were in any way inadequate or below a level of reasonable competence.

Finally, even assuming that trial counsel's performance could in some way be characterized as deficient, which I do not find, his conduct was not so deficient as to create a reasonable probability that those deficiencies materially contributed to defendant's conviction. Strickland v. Washington, 466 U.S. 668.

(RE10 at 7-11.) The Appellate Division affirmed the denial of relief for the reasons stated by the PCR court. (RE14.) The determination of the state courts was neither contrary to nor an unreasonable application of governing federal law. Petitioner is not entitled to relief on this claim.

2. "Brady" violations

Petitioner contends that his counsel was ineffective because he either failed to file a motion to obtain discovery, or failed to follow up on the alleged Brady violation, to obtain evidence including Edna Smith's and Sidney Walter's statements to police, crime scene photographs, and the full disclosure of another witness referred to in police reports as "Schwartz." This issue was raised in the second motion for post-conviction relief, (RE21), and was denied. "In petitioner's most recent petition for post-conviction relief, he again challenges counsel's strategy and tactics rather than stating a viable claim

warranting relief." (RE22 at RA29.) The Appellate Division affirmed for the reasons stated by the PCR court. (RE23.)

As to the underlying issue, the alleged Brady violation, as noted supra, the PCR court found the claim meritless. Here, there is no suggestion that there is a reasonable probability that the outcome would have been different had the omitted evidence been presented. For example, the fact that an iron fence may have obstructed Ms. Smith's view could have been brought to the attention of the jury without the crime scene photographs. Petitioner is not entitled to relief on this claim.

3. Instructions on "Reasonable Doubt"

On direct appeal, Petitioner challenged the adequacy of the jury instruction on "reasonable doubt." It does not appear that this claim was raised in the context of a claim of ineffective assistance of counsel, as it is here. (RE3 at 21-24.) The charge in full was as follows:

What do we mean by reasonable doubt. We have two crucial elements in this case. One is credibility and one is reasonable doubt. A reasonable doubt is not a doubt based on hunch or guesswork or speculation. A reasonable doubt is not a mere possible or imaginary doubt. Everything relating to what people say and do is open to some possible or imaginary doubt. I think, as you heard, at least one counsel say and perhaps both, a reasonable doubt does not mean certainty. The only time we might be certain is if we ourselves were there. I would suggest to you even if we ourselves were there we might not be certain. Now, we are not talking about certainty. A reasonable doubt, ladies and gentlemen, is an honest and reasonable uncertainty as to the guilt of the defendant existing in your minds only after you have given full and impartial

consideration to all the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It's a doubt which a reasonable thinking person has after carefully weighing all of the evidence and the testimony.

(4T92-93 (emphasis added).) Considering the charge as a whole, the Appellate Division found no error requiring reversal. (RE5.)

Generally, a jury instruction that is inconsistent with state law does not merit federal habeas relief. Where a federal habeas petitioner challenges jury instructions given in a state criminal proceeding,

[t]he only question for us is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." It is well established that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. In addition, in reviewing an ambiguous instruction ..., we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. And we also bear in mind our previous admonition that we "have defined the category of infractions that violate 'fundamental fairness' very narrowly." "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."

Estelle v. McGuire, 502 U.S. 62, 72-73 (1991) (citations omitted). Thus, the Due Process Clause is violated only where "the erroneous instructions have operated to lift the burden of proof on an essential element of an offense as defined by state law." Smith v. Horn, 120 F.3d 400, 416 (1997). See also In re Winship, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond

a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (jury instructions that suggest a jury may convict without proving each element of a crime beyond a reasonable doubt violate the constitutional rights of the accused).

In evaluating a challenged instruction,

a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.

Middleton v. McNeil, 541 U.S. 433, 437 (2004) (internal quotations and citations omitted).

A jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden [of proof beyond a reasonable doubt] is plainly inconsistent with the constitutionally rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104 (1972). "[T]rial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." Victor v. Nebraska, 511 U.S. 1, 22 (1994); see also Cage v. Louisiana, 498 U.S. 39, 41 (1990). As the Supreme Court explained in Victor,

so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising

the jury of the government's burden of proof. Rather, taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.

Victor, 511 U.S. at 6 (citations and internal quotation marks omitted).

"[A] misdescription of the burden of proof ... vitiates all the jury's findings. Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (emphasis in original). Such an error is considered structural and thus is not subject to harmless error review. See id. at 280-82. But see Neder v. United States, 527 U.S. 1, 8-11 (1999) (applying harmless-error analysis where jury was not instructed on an element of an offense).

The determination of the Appellate Division that the challenged instruction did not unconstitutionally shift the burden of proof is neither contrary to nor an unreasonable application of governing federal law. Here, the trial court tailored the instruction on reasonable doubt in response to comments made by both counsel in their closing arguments. The instruction did not permit conviction on less than proof beyond a reasonable doubt. As the instruction did not relieve the government of its burden of proof, trial counsel could not have been ineffective for failing to object to it. Petitioner is not entitled to relief on this claim.

4. Validity of prior convictions

The trial court found that Petitioner qualified for an extended term both as a persistent offender and, mandatorily, as a second offender with a firearm under N.J.S.A. 2C:44-3a and d. (6T.) Petitioner claims that his counsel provided ineffective assistance at sentencing because he failed to challenge the validity of the prior convictions used to enhance Petitioner's sentence. Petitioner alleges that those prior convictions were unconstitutional because of defects in the plea process.

Petitioner unsuccessfully challenged the legality of his sentence on direct appeal and in his first and second motions for post-conviction relief. It does not appear, however, that he ever raised the issue of the legality of the prior convictions used to impose an enhanced sentence.³ (RE3; RE6; RE21 at 51.)

Whether the convictions used to enhance Petitioner's sentence are subject to attack as illegal, Petitioner does not allege that any such conviction was reversed or otherwise invalidated at the time of his sentencing. Without deciding whether any such conviction was illegal, it was not ineffective assistance to avoid challenging them at the sentencing. Under New Jersey law, a trial court is required to impose a mandatory extended term at the time of initial sentencing, even if an

³ Respondents do not assert that this claim is unexhausted. This Court will exercise its authority under 28 U.S.C. § 2254(b)(2) to deny this claim on the merits.

appeal is pending on a prior Graves Act conviction or if the time to appeal has not then expired; "[h]owever, should the prior conviction be reversed on appeal subsequently, the trial court shall, on motion by a defendant pursuant to Rule 3:21-10(b)(4) or Rule 3:22-2, amend the extended-term sentence to an ordinary Graves Act sentence." State of New Jersey v. Haliski, 140 N.J. 1, 20 (1995). Thus, should Petitioner obtain a reversal of any of the allegedly illegal convictions, New Jersey provides a remedy for correction of his sentence. Petitioner is not entitled to relief on this claim.


IV. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Here, Petitioner has failed to make a substantial showing of the denial of a constitutional right. No certificate of appealability shall issue.

V. CONCLUSION

For the reasons set forth above, the Petition must be denied. An appropriate order follows.



Garrett E. Brown, Jr.
Chief Judge
United States District Court

Dated: *June 21, 2006*